

**IN THE CHANCERY COURT FOR WILLIAMSON COUNTY, TENNESSEE  
TWENTY-FIRST JUDICIAL DISTRICT AT FRANKLIN**

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**STATE OF TENNESSEE, *ex rel.***  
**ROBERT E. COOPER, JR., ATTORNEY**  
**GENERAL and REPORTER,**

**Plaintiff,**

**v.**

**ROLAND FROEHLIG a.k.a. Rollie Froehlig,**  
**THEODORE HOWES a.k.a. Ted Howes,**  
**NATIONAL FULFILLMENT, INC., and**  
**ENTERTAINMENT AMERICA, INC.,**

**Defendants.**

No. 33293

**JURY DEMAND**

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**MEMORANDUM OF LAW IN SUPPORT OF STATE'S MOTION FOR TEMPORARY  
INJUNCTIVE RELIEF WITH ASSET FREEZE AND OTHER EQUITABLE RELIEF**

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The State has initiated a civil law enforcement proceeding brought by the Attorney General of the State of Tennessee ("Attorney General" or "State") pursuant to the Tennessee Identity Theft Deterrence Act of 1999<sup>1</sup> ("ITDA"), the Tennessee Consumer Protection Act of 1977<sup>2</sup> ("TCPA"), the Attorney General's general statutory authority,<sup>3</sup> and the Attorney General's authority at common law to secure injunctive and other equitable relief prohibiting the Defendants from engaging in identity theft or other unfair and deceptive acts and practices.

The Defendants in this case have engaged in an unlawful scheme to bill consumers for a product that never existed. This scheme has harmed consumers and has damaged the integrity of the marketplace. This court has the ability to take the steps necessary to protect past, present, and future consumers by issuing a temporary injunction against the Defendants and an asset freeze against

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<sup>1</sup> Tenn. Code Ann. § 47-18-2101 *et seq.*

<sup>2</sup> Tenn. Code Ann. § 47-18-101 *et seq.*

<sup>3</sup> Tenn. Code Ann. § 8-6-109.

Defendant National Fulfillment and Defendant Entertainment America, limited in its total scope to \$545,000, the amount of the money received by Defendants from their billing scheme under this account. For the reasons more fully stated below, a temporary injunction and an asset freeze should issue pending a full hearing on this matter.

## **PARTIES**

Plaintiff, State of Tennessee, *ex rel.* Robert E. Cooper, Jr., Attorney General and Reporter, is charged with enforcing the ITDA, which prohibits identity theft and any other unfair, deceptive, misleading acts or practices for the purpose of directly or indirectly engaging in identity theft, and the TCPA, which prohibits unfair or deceptive acts or practices affecting the conduct of trade or commerce. Pursuant to Tenn. Code Ann. §§ 47-18-2105(a) and 47-18-2106(c), the Attorney General, at the request of Mary Clement, Director of the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance, may initiate civil law enforcement proceedings in the name of the State to enjoin violations of the ITDA and to obtain an asset freeze. Pursuant to Tenn. Code Ann. § 47-18-108(a)(1), the Attorney General, at the request of the Division of Consumer Affairs, may initiate civil law enforcement proceedings in the name of the State to stop violations of the TCPA and to secure such equitable and other relief as may be appropriate in each case.

Defendant Froehlig, sued individually and in a representative capacity, is the President of both National Fulfillment, Inc. and Entertainment America, Inc. Defendant Froehlig is also the Chief Executive Officer of National Fulfillment, Inc. and Entertainment America, Inc. and serves as Chairman on the Board of Directors of National Fulfillment, Inc. and Entertainment America, Inc.<sup>4</sup>

Defendant Howes, sued individually and in a representative capacity, is the Executive Vice President and the *de facto* Chief Financial Officer of National Fulfillment.<sup>5</sup> Aside from being an officer

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<sup>4</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 12-13; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 14-15; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 6-7. ("Attach." shall mean "Attachment to the State's Motion for Temporary Injunction and Asset Freeze.").

<sup>5</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 10.

of National Fulfillment and Entertainment America, Defendant Howes is a member of the Board of Directors for both National Fulfillment, Inc. and Entertainment America, Inc.<sup>6</sup> Defendant Ted Howes is responsible for and oversees the accounting functions of both National Fulfillment, Inc. and Entertainment America, Inc.<sup>7</sup> In the chain of command at the companies, Defendant Howes serves directly under Defendant Froehlig with the exception of sales and the client service department.<sup>8</sup>

Defendant National Fulfillment, Inc. (“National Fulfillment”) is a Tennessee corporation based in Lebanon, Tennessee, that provides a menu of logistical, billing, shipping, and customer services to third party owners of consumer products. Many of these consumer products are advertised either on cable television commercials or on infomercials on television. In the ordinary course of its business, Defendant National Fulfillment collects and stores credit card, debit card and other financial information for most of its clients.

Defendant Entertainment America, Inc. (“Entertainment America”) is a Tennessee corporation based in Lebanon, Tennessee, that acts as a broker house for National Fulfillment’s clients to obtain payment and order processing, including credit card processing from third-party order processors who actually bill consumer credit cards. Entertainment America establishes merchant accounts for each of its clients that seek credit card processing from these third parties. Credit card companies require merchant accounts in order for a company to be able to bill their credit cards. Entertainment America, Inc. is located within the warehouse owned, and primarily used, by National Fulfillment, Inc. The shares of Entertainment America are principally owned by National Fulfillment.

Other key management level employees involved in this matter include: Vicki Martin, who is on the Board of Directors of National Fulfillment, a Vice President at National Fulfillment, and head of the Consumer Care Division (the customer service division) of National Fulfillment; Jerry Bellante, who was on the Board of Directors of National Fulfillment at the time at issue in this matter, was a Vice

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<sup>6</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 18-20.

<sup>7</sup> Attach. B, Tr. of Sworn Test. of Ted Howes, at 11; *see also* Attach. C, Tr. of Sworn Test. of Rollie Froehlig, at 12.

<sup>8</sup> Attach. B, Tr. of Sworn Test. of Ted Howes, at 11-12, 15.

President at National Fulfillment, and was in charge of Operations at National Fulfillment; and Townley Chattman, who was a Vice President of Client Services and who was responsible for the employees at National Fulfillment who acted as direct liaisons between a client and National Fulfillment.

### **GENERAL ALLEGATIONS**

As a way of preface, the State alleges that the Defendants billed **approximately thirty thousand (30,000) consumers** and **attempted to bill approximately three hundred thousand consumers (300,000)<sup>9</sup> \$19.90 each for a product that never existed under a phony account known as “EmTech.”<sup>10</sup>**

The State alleges that the Defendants unlawfully harvested the credit card, debit card, and other financial information belonging to the customers of some of its current and past clients in this billing scheme. Despite repeated requests from the management for routine pieces of information to verify the legitimacy of the “EmTech” account as early as when the account was first presented to management, the Defendants failed to ever provide adequate verification of the product. Defendants continued to bill consumers despite strong indications that the bits of information that were provided about the account by the Defendants were suspect and despite being openly questioned about whether the “EmTech” account was fraudulent by one of National Fulfillment’s officers before billing ceased. Aside from the third-party processor who actually ran the card numbers, the money collected from these billings has never been transferred outside of the bank accounts of the corporate Defendants, but has been dissipated internally. National Fulfillment has deducted **\$511,425.62** from the total EmTech billing amount from Entertainment America, its wholly owned sister corporation, which has only approximately **\$34,060.38** left from the EmTech billings.<sup>11</sup>

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<sup>9</sup> Other internal correspondence at the company indicates that this number might have even been as high as 400,000.

<sup>10</sup> Each citation of EmTech will be designated with quotation marks to remind the reader that it is the State’s contention, based on the facts below, that the “EmTech” product never existed and was part of Defendants’ unlawful billing scheme.

<sup>11</sup> See Attach. D, “EmTech Client Reconciliation as of 1/11/2007,” at 1.

Defendants Froehlig and Howes maintain that they were approached by Marc Nagoshiner, a business acquaintance of Defendant Froehlig who died prior to the Defendants' initial response to the State's Request for Consumer Protection information,<sup>12</sup> with a list of consumers who had received, but who had never been billed for an exercise band. Defendants Froehlig and Howes maintain that the bands were shipped through an unknown fulfillment house in California that went out of business.<sup>13</sup>

The information gathered so far does not support the Defendants' version of events.

### STATEMENT OF FACTS

After November 2004, sales at National Fulfillment dropped off roughly thirty (30) to forty (40) percent.<sup>14</sup> At the beginning of calendar year 2005, Defendant National Fulfillment was struggling financially and had terminated some employees.<sup>15</sup> During this time, Defendant National Fulfillment was at least slow to pay some of its creditors.<sup>16</sup>

#### *The Initial Presentation of the "EmTech" Account*

Around March 2005, Defendant Froehlig approached the management and/or staff of both corporate Defendants with a potential "client."

Initially, Mr. Froehlig stated that **Eddie Mischán**, of Emson Products, a former active

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<sup>12</sup> National Fulfillment responded to the State's Request for Consumer Protection Information on April 7, 2006. Marc Nagoshiner died December 30, 2005. Attach. E, State of Fla., Office of Vital Statistics, Florida Certificate of Death for Marc Nagoshiner; *see also* Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 30 ("It was either late 2005, I think it was late 2005 or early 2006.").

<sup>13</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 33; *see also*, Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 23 ("Q: What were you told that EM Tech had sent customers product through another fulfillment house and that National Fulfillment was supposed to bill for it?" "A: I'll have to exercise, once again, my Fifth Amendment rights.").

<sup>14</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 24.

<sup>15</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 27 ("Q: What was National Fulfillment's financial health at the beginning of calendar year 2005, not in terms of numerical data, but just in a broad sense?" "A: 2005. We were struggling." "Q: By "struggling," what do you mean?" "A: I know that I had - I had actually issued some layoffs."); *see also* Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 42 ("Q: Do you recall National Fulfillment's financial health status at the time?" "A: Very poor.").

<sup>16</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 42 ("A: I know that we were struggling to keep things shipping. I mean, we were getting our shipping providers cutting us off. I know I was having to go frequently to get certain bills paid where I was getting late notices."); Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 41-42. ("Q: Okay. So I take that as a yes, that some payments were slow?" "A: Probably, yes, you know, without having a list in front of me.").

client of National Fulfillment, was the person who requested that National Fulfillment bill the credit cards.<sup>17</sup> At the time that Emson was an active account, they were one of the larger clients that National Fulfillment had.<sup>18</sup>

In his sworn testimony, Defendant Froehlig denied that Eddie Mischan had any connection to the “EmTech” account.<sup>19</sup> Defendant Howes denied that Emson had any connection to the “EmTech” account to his knowledge.<sup>20</sup>

Both Defendant Froehlig and Defendant Howes claim instead that it was Marc Nagoshiner, now deceased, who was responsible for “EmTech.”<sup>21</sup> Neither fellow board member, Vicki Martin,<sup>22</sup> nor Townley Chattman, Director of Client Services, recall that Marc Nagoshiner was connected to the “EmTech” account.<sup>23</sup> Marc Nagoshiner died on December 30, 2005, prior to Defendant National Fulfillment’s and Defendant Entertainment America’s response to the State’s Request for Consumer Protection Information.<sup>24</sup> Defendant Froehlig was the only person who claimed to talk to

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<sup>17</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22 (“There’s one name that you haven’t mentioned that he mentioned at the beginning of this whole fiasco and never mentioned again and said that we should not consider it an Emson product. It was an old client of ours, and they were called Emson.” “Q: How do you spell that?” “A: E-m-s-o-n. He initially told us that a guy there named Eddie Mischan - -” “Q: How do you spell that?” “A: M-i-s-c-h-a-n.” “Q: Okay.” “A: - - had requested that he bill these cards, that they had shipped this product to these customers. But then that went away, and we had to refer to it from then out as EM Tech.”).

<sup>18</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 36; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 29 (“Q: Okay. And were they among the largest clients with the largest customer base?” “A: Yes.”); *see also*, Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 115 (“Q: Are we talking 200-300, 000?” “A: I believe that.” “Q: So it’s around 200-300,000 roughly speaking?” “A: Yeah.”).

<sup>19</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 31. (“Q: Were there any other contacts at EM Tech that you had?” “A: A fellow named Eddie - - I can’t remember his last name. It’s almost something like Cunningham comes to mind, but I’m not sure of that.” “Q: Mischan?” “A: No. Eddie Mischan was a similar-named company called Emson, E-m-s-o-n.” “Q: Besides Marc Nagoshiner and Eddie, were there any others?” “A: Not that I’m aware of. I think he had a financial person, but I never talked to that person.”).

<sup>20</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 29.

<sup>21</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 30; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig at 28.

<sup>22</sup> *See* Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 22-23.

<sup>23</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 14.

<sup>24</sup> Attach. E, State of Fla., Office of Vital Statistics, Florida Certificate of Death for Marc Nagoshiner.

Marc Nagoshiner about the “EmTech” account.<sup>25</sup> Defendant Howes claims to have once called someone named “Patty” about the “EmTech” account, but she never got back to him.<sup>26</sup>

Defendant Froehlig also provided Townley Chattman with a disc of customers that had approximately three hundred thousand (300,000) consumers information on it, including credit card information, **which appeared to be a download of the Emson database that Defendant National Fulfillment had provided to Emson when they ceased being an active client of Defendant National Fulfillment.**<sup>27</sup> The disc said **“National Fulfillment” at the top, and it had the same layout as one given to a former client.**<sup>28</sup>

At the time that the disc that appeared to be a download of the Emson database was presented, Townley Chattman questioned Defendant Froehlig about whether he had the correct disc because the disc had so many names on it.<sup>29</sup> She found it hard to believe that every one of Emson’s prior customers had received this product.<sup>30</sup>

Defendant Froehlig also told Vicki Martin, his fellow board member on National Fulfillment, that the “EmTech” account had two hundred thousand to three hundred thousand

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<sup>25</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 37 (“Q: Did anyone else talk with EM Tech?” “A: With Marc?” “Q: Yes.” “A: No, I don’t think so.”).

<sup>26</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 31. Defendant Froehlig told Defendant Howes that Eddie, Patty, and Marc Nagoshiner were connected with the “EmTech” account. Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 31.

<sup>27</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22-23 (“[N]ow he provided me with a disk of customers that had approximately 300,000 names on it, and it was - - it appeared - - I never verified this, but it appeared to be a download of the Emson database that we had provided to Emson, the former client of ours, when they left.”).

<sup>28</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 23 (“[B]ut when we do downloads, it provides you with a client name and a quantity. And it says National Fulfillment at the top, and it had that same layout on that disc, that Emson - - approximately 300,000 names. I don’t remember the exact quantity.”).

<sup>29</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22 (“At the time, this was another discussion between Rollie and myself. I questioned him about whether that was the correct disk, because it had so many names on it. And I found it hard to believe that every one of Emson’s prior customers had received this product.”).

<sup>30</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22.

(200,000 - 300,000) people to process.<sup>31</sup>

After being questioned about the high number, Defendant Froehlig took the disc back and said he would get back to her. Defendant Froehlig came back to Townley Chattman about a month later with a disc with approximately thirty thousand (30,000) customers on it.<sup>32</sup> The client was from then on referred to as “EmTech.”<sup>33</sup>

Despite this, Defendant Froehlig maintains that only forty-five to fifty thousand (45-50,000) consumers’ credit card and debit cards were due to be processed and that the “EmTech” account never had two hundred to three hundred thousand (200-300,000) consumers’ credit card numbers to bill.<sup>34</sup>

Defendant Froehlig stated at the initial presentation and has since maintained that he had been approached by someone who claimed to have shipped a product through another fulfillment house<sup>35</sup> to consumers who were never billed for that product.<sup>36</sup>

Management or other staff expressed concern for the lack of information about the product and the decision was made that the companies should not establish an account for the client.<sup>37</sup>

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<sup>31</sup> Attach. A, RCPI Sworn Test. of Vicki Martin, at 68-69 (“Q: So Rollie Froehlig told you that the Em Tech account had 200- to 300,000 people to process?” “A: Yes.”); *see also* Attach. A, RCPI Sworn Test. of Vicki Martin, at 69 (“My understanding was, there was a total of 2- to 300,000 that could be processed that was shipped merchandise but never billed for that merchandise. Of those -- the first batch, for lack of a better word, that we were supposed to process was about 37,000 . . . When everything was said and done, the total amount processed was 29,000 some-old [sic] customers.”); Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 40.

<sup>32</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 23.

<sup>33</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22.

<sup>34</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 35.

<sup>35</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 36.

<sup>36</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 34.

<sup>37</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 78; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 34 (“[A]nd in a staff meeting, I brought it up or -- I’m not sure whether it was a staff meeting or a manager’s meeting, and was absolutely shot down by everybody at our place. They didn’t want to do the thing. And I went back to Marc and said, ‘No, because we didn’t have the order data. We didn’t have the -- we didn’t ship the product, and we needed to have that prior to doing his fulfillment.’”); *see also* Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 38 (“Mostly that we didn’t want this client. We didn’t feel comfortable not fulfilling a product but providing merchant services and consumer care services without shipping records, without knowing for sure that a letter went to customers, only being told by the client that a letter went to the customers. There was discomfort in the fact that we didn’t have a commercial. We didn’t have a product sample. There was no liaisons with our account management staff



### ***Opening of the “EmTech” Account Despite Management’s Previous Rejection***

Around April 2005, “EmTech’s” client account was set up.<sup>38</sup>

Defendant Froehlig decided to be the only point of contact for “EmTech” purportedly “[b]ecause it was highly unusual, and [he] wanted no confusion because of the fact that it was unusual.”<sup>39</sup>

Aside from Defendant Froehlig’s claim to have contact with “EmTech,” no other individual at either Defendant National Fulfillment or Defendant Entertainment America had contact with, access to, or communicated with “EmTech.”<sup>40</sup> Defendant Howes stated that he once tried to contact someone at “EmTech,” but she never called him back and he did not follow-up.<sup>41</sup>

When the account first began, Defendant Froehlig authorized an “immediate credit - no questions asked” refund policy.<sup>42</sup> The refund policy also included the payment of overdraft

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with the client.”); *see also* Attach. A, RCPI Sworn Test. of Vicki Martin, at 55 (“Because this client - - this client was cause for concern at the beginning . . .”).

<sup>38</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 68; Ex. 2 to Attach. B, Tr. of RCPI Sworn Test. of Ted Howes; Ex. 2 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

<sup>39</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 37-38.

<sup>40</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 48-49 (“Q: Was he the only one that communicated with EMTECH?” “A: Yes.”); Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 44; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 32 (“[Rollie Froehlig] was the salesperson and the liaison with the client.” “Q: Okay. Who else had contact with the client?” “A: No one that I know of.”); Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 28; Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 32. *see also*, Attach. A, RCPI Sworn Test. of Vicki Martin, at 30. (“[Townley Chattman] told me that [Rollie Froehlig] was the account manager because he was the only one that had direct contact with his client.”); Ex. 1 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig (“ . . . Rollie is the account manager on this account and can address any other questions that you may have about the product as he is the only point of contact with the client.”); *See also*, Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 25 (“Q: Is it fair to say that Rollie Froehlig had the only point of contact with EM Tech?” “A: I’ll have to exercise my Fifth Amendment rights.”).

<sup>41</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 31-32.

<sup>42</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 46; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 72; *See also*, Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 26. (“Q: Did Mr. Froehlig indicate that National Fulfillment would immediately credit any customer that called with a complaint, no questions asked?” “A: I’ll have to exercise my Fifth Amendment rights.”).

charges.<sup>43</sup> This “immediate credit, no questions asked” policy that included the payment of overdraft charges for debit card users lasted throughout the life of the account.<sup>44</sup> The immediate credit policy that included the payment of overdraft charges for debit card users had **never been done** before by Defendant National Fulfillment and has not been done since.<sup>45</sup>

At the time the account was first set up under the name “EmTech,” the Defendants did not have a sample of the actual product,<sup>46</sup> a sample of the advertisements for the product,<sup>47</sup> the specific shipping dates that the product was sent to consumers,<sup>48</sup> or the specific dates that consumers ordered the product.<sup>4950</sup>

Defendant National Fulfillment’s own internal documentation for the “EmTech” account evidences this lack of information about “EmTech.” National Fulfillment uses a standardized

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<sup>43</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 46; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 72.

<sup>44</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 37.

<sup>45</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 37.

<sup>46</sup> Ex. 2 to Attach. B of Tr. of RCPI Sworn Test. of Ted Howes (“Also, when can we expect the original offer scripting, product sample, production information (features and benefits), a copy of the letter sent to customers, in order to effectively answer chargebacks, BBB et cetera, a copy of the setup sheet indicating our C/S rules to follow in terms and crediting, reshipping, et cetera. Thanks Vicki.”); Ex. 1 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig (“[R]ollie has requested a sample of the product and a copy of the letter sent to the customer. He indicated that we will begin billing customers prior to receiving this information.”).

<sup>47</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 57; *see* Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 60 (“I do remember seeing a two-minute spot or a one-minute spot on television, but I wasn’t provided a VHS or DVD copy.” . . . “Q: But you don’t have a copy of that advertisement?” “A: No.”).

<sup>48</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 60; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 73 (“Q: Okay. But you have no particular date that the — you had no records of the particular date that the customer received the EM Tech exercise product or the exercise band, that they were shipped that product on a particular day?” “A: No. I don’t think it existed because the company went out of business, and I don’t think - - that was one of the problems that we had from the very beginning, was that we didn’t - - it wasn’t part of the records.”); Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 60.

<sup>49</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 73 (“Q: What about order dates that specific customers - -” “A: No. We didn’t have that, either.”).

<sup>50</sup>Ex. 2 to Attach. B, Tr. of RCPI Sworn Test. of Ted Howes (“Also, when can we expect the original offer scripting, product sample, production information (features and benefits), a copy of the letter sent to customers, in order to effectively answer chargebacks, BBB et cetera, a copy of the setup sheet indicating our C/S rules to follow in terms and crediting, reshipping, et cetera. Thanks Vicki.”); *see also*, Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 23 (“Q: Were the traditional setup procedures followed on the EM Tech account?” “A: I’ll have to exercise my Fifth Amendment rights.”).

“Client Set Up Sheet”<sup>51</sup> whenever a client account is opened. These records are normally kept in the course of business.<sup>52</sup> Normally, the Client Set Up Sheet is filled out and signed by the client or the client’s representative.<sup>53</sup> The Client Set Up Sheet requests, among other things, the client’s contact information, a description of the client’s product, the price of the product, the price of any shipping and handling, and the customer service toll-free number that the client will be using.<sup>54</sup>

One of “EmTech’s” Client Set Up Sheets is dated April 13, 2005.<sup>55</sup> Another one of “EmTech’s” Client Set Up Sheets is dated July 25, 2005.<sup>56</sup>

“EmTech’s” Client Set Up Sheet dated April 13, 2005 lists as follows:

Product Name:	EMTech
Company Name:	EMTech c/o Entertainment America
Primary Contact:	Rollie Froehlig
Address:	6960 Eastgate Blvd
City, State, Zip:	Lebanon, TN 37090 <sup>57</sup>

The Client Set Up Sheet dated July 25, 2005 states the following:

Product Name:	EMTech
Company Name:	EMT
Primary Contact:	Dick Whitehead
Address:	1003 Trailmore Lane
City, State, Zip:	Weston, FL 33326 <sup>58</sup>

Defendant Froehlig maintains that the Client Set Up Sheet for “EmTech” on July 25, 2005 is incorrect.<sup>59</sup>

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<sup>51</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 44, 58; *see also*, Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 28 (“When a client comes through the sales department, the account manager or the salesperson goes through the set-up sheets, which is a 10- or 12- page document telling all departments how they want their product inventory handled.”).

<sup>52</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 64.

<sup>53</sup> *See* Exs. 2 and 3 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 7-8.

<sup>54</sup> *See generally*, Exs. 2 and 3 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 73.

<sup>55</sup> Ex. 2 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

<sup>56</sup> Ex. 3 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

<sup>57</sup> Ex. 2 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

<sup>58</sup> Ex. 3 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

<sup>59</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 74.

Despite being the only point of contact with “EmTech,”<sup>60</sup> Defendant Froehlig states that Dick Whitehead, a business acquaintance of his, is **“not at all”** connected with “EmTech.”<sup>61</sup> The name “Richard Whitehead” surfaces again and is listed as the contact on the letter purportedly sent to consumers prior to their credit cards being charged that Defendant Froehlig claims to have been given to him by “EmTech.”<sup>62</sup>

The Client Set Up sheet also contains an “Account Prepayment & Credit Agreement” which states that “All clients are required to pay in advance an amount sufficient to pay shipping charges for their consumer orders and refunds for check orders. . . . An additional 25% to provide funds for check orders **will** also be requested. . . . **To open a client account we must** have an original signed copy of this agreement returned to us along with your credit application.”<sup>63</sup>

“EmTech” did not advance the required twenty five (25) percent for refunds per Defendant Froehlig’s instructions<sup>64</sup> in spite of the fact that Defendant Froehlig considered the “EmTech” account risky.<sup>65</sup>

In spite of the boilerplate language, a representative of “EmTech” did not sign either the

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<sup>60</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 48-49 (“Q: Was he the only one that communicated with EMTECH?” “A: Yes.”); Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 44; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 32 (“[Rollie Froehlig] was the salesperson and the liaison with the client.” “Q: Okay. Who else had contact with the client?” “A: No one that I know of.”); Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 28; Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 32. See also, Attach. A, RCPI Sworn Test. of Vicki Martin, at 30. (“[Townley Chattman] told me that [Rollie Froehlig] was the account manager because he was the only one that had direct contact with his client.”); Ex. 1 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig (“[R]ollie is the account manager on this account and can address any other questions that you may have about the product as he is the only point of contact with the client.”); See also, Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 25 (“Q: Is it fair to say that Rollie Froehlig had the only point of contact with EM Tech?” “A: I’ll have to exercise my Fifth Amendment rights.”).

<sup>61</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 66.

<sup>62</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 78 (“A: This was sent up to us from Marc Nagoshiner.”)

<sup>63</sup> Exs. 2 and 3 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 7-8. (emphasis added).

<sup>64</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 57 (“And did EM Tech advance the required 25 percent for refunds?” “A: No, they did not.” . . . “A: Would you like to know why?” “Q: Sure.” “A: Because I’m the boss, and I made that decision.”).

<sup>65</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 135 (“Marc Nagoshiner wasn’t risky. The EM Tech product was risky.”); Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 138. (“We took on a risky client. . . .”).

Account Prepayment & Credit Agreement or Defendant National Fulfillment's Credit Application on either the Client Set Up Sheet dated April 13, 2005 or the Client Set Up Sheet dated July 25, 2005.<sup>66</sup>

### ***Billing of Consumer Cards Under the "EmTech" Account***

There were several delays to start billing under the "EmTech" account because management wanted more information including a sample letter that was sent out to customers prior to billing and a sample of the actual product.<sup>67</sup>

Defendants began billing consumers around the end of July 2005 and continued billing at least until the first week of September 2005.<sup>68</sup>

Defendants billed consumers in small "batches" at Defendant Froehlig's request.<sup>69</sup> National Fulfillment first billed from July 29, 2005 through August 5, 2005, stopped for three days and then continued billing from August 11-19, 2005, stopped and then continued billing again from August 30 until September 6, 2005.<sup>70</sup> Defendant Froehlig denies that the billings were split up at his request.<sup>71</sup>

A merchant account holder cannot have its chargebacks exceed one percent of the total sales in that month for three months in a row.<sup>72</sup> Defendants appeared to have made their decision to start billing based on the charge back and complaint levels on the account.<sup>73</sup>

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<sup>66</sup> Exs. 2 and 3 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 7-8.

<sup>67</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 74.

<sup>68</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 33-34.

<sup>69</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 25; *see also* Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 64.

<sup>70</sup> Attach. D, "EmTech Client Reconciliation as of 1/11/2007," at 4.

<sup>71</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 68 ("Q: So what was the reason for splitting it up into batches of 3,000?" "A: I'm not sure." "Q: But is that what, in fact, had occurred?" "A: That decision was not made by me.").

<sup>72</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 40.

<sup>73</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 113 ("A: You know, when things get a little hectic at one time, it seems like that's the only problem you have, and it's pretty serious. But after we then looked into it and looked at the actual numbers, I guess at that date and a later date, it turned out that this wasn't one that was extremely trying. You know, it wasn't extremely out of the ordinary as far as the numbers were concerned." "Q: And you mean numbers like chargebacks or consumer complaints?" "A:

Every National Fulfillment client has a separate merchant account at Defendant Entertainment America if they choose the credit card processing feature from Defendant National Fulfillment.<sup>74</sup> If there were a large number of chargebacks, only that specific merchant account and not all of Defendant Entertainment America's merchant accounts would be affected.<sup>75</sup>

Defendant Froehlig, with Defendant Howes's knowledge and approval, ordered that the billing be restarted after it was stopped several times from late July to at least early September 2005.<sup>76</sup>

Once billing began, some management level employees got together without Defendant Howes or Defendant Froehlig and expressed concern that the company did not have the proper shipping records or direct contact with the client.<sup>77</sup>

#### ***Lack of Basic Information About the EmTech Account***

Neither Defendant Froehlig nor Defendant Howes nor anyone else employed at the corporate Defendants produced a sample advertisement to the corporate Defendants' management or anyone else at National Fulfillment or Entertainment America.<sup>78</sup>

Defendant Froehlig, with at least Defendant Howes's knowledge, never provided a corporate referral number for EmTech despite a request by management of both corporate Defendants.<sup>79</sup> Instead, Defendant Froehlig, with at least Defendant Howes's knowledge, told management that Defendant National Fulfillment should handle all of EmTech's calls.<sup>80</sup>

Despite requests from management of both corporate Defendants, neither Defendant

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Yes.”).

<sup>74</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 40.

<sup>75</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 40-41.

<sup>76</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 39.

<sup>77</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 47 (“The concern with this client, we didn’t have shipping records, and we didn’t have direct contact. And quite bluntly, Rollie had made a bad business decision in allowing this client to come to us.”).

<sup>78</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 112-13.

<sup>79</sup> Attach. A, Tr. of RCPI Sworn Test of Vicki Martin, at 35.

<sup>80</sup> Attach. A Tr. of RCPI Sworn Test. of Vicki Martin, at 74 (“Q: Were you ever able to forward a consumer to Em Tech, or were any of your staff?” “A: No.”).

Froehlig, Defendant Howes, nor the corporate Defendants ever produced specific shipping or order dates for the EmTech account to management or anyone else at Defendant National Fulfillment or Defendant Entertainment America.<sup>81</sup>

Instead, Defendant National Fulfillment, per Defendant Froehlig's instructions and with Defendant Howes's knowledge, inserted general parameters for shipping and order dates such as "prior to May 1st [2005]" in EmTech's customer database.<sup>82</sup> Defendant Howes was notified of both management's request for specific shipping dates and Defendant Froehlig's instruction to fill in the shipping date information in customer records with general parameters such as "prior to May 1st [2005]."<sup>83</sup>

***The Few Pieces of Information Produced by Defendants  
Under the "EmTech" Account Are Suspect***

After being requested by Vicki Martin to produce the letter that purportedly warned consumers that they were going to be charged prior to being billed,<sup>84</sup> Defendant Froehlig subsequently produced the following **undated** letter:<sup>85</sup>

DEAR CUSTOMER:

Some time ago, you were sent via the US Postal Service, the exercise bands you previously ordered. However, due to a computer mix-up, you were not billed at the time of shipment. We just discovered this error, [sic] and have now charged your credit card for

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<sup>81</sup> See Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 26 ("At the time we had the first meeting, we requested order dates and ship dates. Rollie said he would get them but didn't. He gave us parameters, and I don't remember exact dates.").

<sup>82</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 53-55; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 97-98.

<sup>83</sup> *Id.*

<sup>84</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 78-79 ("Q: Just in general terms, was this prior to the account?" "A: I'm not sure it was exactly prior to, but it was shortly after. If it wasn't prior to, it was shortly after, because Vicki Martin in my office was almost daily saying, I don't have a copy of it. I don't have a copy of it. And I would respond back to Marc to get it up." . . . "Q: But it's your recollection it was around the beginning part of the account?" "A: Yes." "Q: Okay." "A: I think it was." "Q: But, to the best of your knowledge, it was at the beginning part of the account?" "A: Yes.").

<sup>85</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 24-25 ("A: [R]ollie later gave us the letter that had Richard Whitehead's name on it. I don't remember the exact words, but something about, you were forwarded this product. You will be billed."); see also Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 22 ("Q: Was there a letter that was provided to managers that had the name Richard Whitehead on it?" "A: I will have to exercise my Fifth Amendment rights.").

the product you ordered. We hope when you see the charge on your credit card statement, you will remember the initial request for the product and receiving it. If however, you have any questions relating to the product, the charge to your credit card, or wish to return the bands for a full credit, please call the number below. I hope you are enjoying the EmTech exercise bands.

Richard Whitehead  
Emtech  
866-299-1689

Defendants Froehlig and Howes told management that the letter was sent by “EmTech” to the consumers who would be billed for “EmTech’s” product.<sup>86</sup>

Despite the insistence of Vicki Martin, Consumer Care Manager, Defendant National Fulfillment **never attempted** to ship out the postcards itself.<sup>87</sup>

Neither of the corporate Defendants have ever employed someone by the name of Richard Whitehead, the individual listed in the signature block of the letter.<sup>88</sup>

The number 866-299-1689 is a toll-free number that belongs to Defendant National Fulfillment and is answered by Defendant National Fulfillment’s Consumer Care Division; the division within the company responsible for answering incoming calls at that number.<sup>89</sup> Despite listing National Fulfillment’s 1-800 number in the letter, **no one** in National Fulfillment’s Consumer Care Division **took a call from a consumer who referenced receiving the Richard Whitehead letter**.<sup>90</sup> No postage receipts, stamps, returned mailings, or any other evidence was produced to the

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<sup>86</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 63 (“Those postcards were never sent by National Fulfillment. They were sent by the client. My insistence was that we should send it. If we’re going to continue with this client, we need to send out postcards letting them know that charges are to come. If you have a problem with that, let us know before we process the card.”); Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 88.

<sup>87</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 63.

<sup>88</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 27-28; *see also* Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 43.

<sup>89</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 43.

<sup>90</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 45 (“We received no calls as a prompt from this letter.”); Ex. 6 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig (“To date, we have received no calls prompted by the letter signed by Richard Whitehead, which includes our 800 number for consumer care.”); Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 28; *see also* Tr. of RCPI Sworn Test. of Townley Chattman at 13 (“Q: Richard Whitehead?” “A: Okay. That was not an employee of



Consumer Care Division indicating that the Richard Whitehead letter was ever sent out to consumers.<sup>91</sup>

Following one of the meetings with the managers of both corporate Defendants, Defendant Froehlig and Howes were notified that management would like to see a sample of EmTech's actual product.<sup>92</sup>

In response, Defendant Froehlig produced an exercise band.<sup>93</sup> Defendant Howes was at least aware of Defendant Froehlig's production of the exercise band to some of the management and staff of Defendant National Fulfillment and Defendant Entertainment America.<sup>94</sup>

Management at National Fulfillment was left with the impression that the exercise band produced was a sample of one of EmTech's actual exercise bands.<sup>95</sup> The exercise band was also distributed to the Consumer Care Division.<sup>96</sup>

The particular exercise band produced was one owned by SPRI Products, Inc. ("SPRI"), who is not and was not a National Fulfillment client.<sup>97</sup> The exercise band produced identified SPRI Products on the product.<sup>98</sup> SPRI has never had any business relationship with Defendants National

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National Fulfillment or Entertainment America, but that is the name of the man that supposedly mails the letters to the customers that supposedly notified them that they were going to be billed. That's the name that was at the end of the letter."); Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 24-25 (Q: "Did you know of any consumer calling about EM Tech who referenced or was referred by the letter informing consumers that they would be billed?" "A: I will have to exercise my Fifth Amendment rights.").

<sup>91</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 45 ("Q: Did you ever see any postage receipts or any other indication that Exhibit 2, the Richard Whitehead letter/postcard, went out to people?" "A: No."); Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 89.

<sup>92</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 47. ("Was [sic] Rollie Froehlig and Ted Howes notified that you would like a sample?" "A: Yes. . .").

<sup>93</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 48; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 91; *see also* Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 27 ("Q: Were you ever shown a sample of the product?" "A: I'll have to exercise my Fifth Amendment rights.").

<sup>94</sup> Ex. 3 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin.

<sup>95</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 123; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 48.

<sup>96</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 123; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 48.

<sup>97</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 51.

<sup>98</sup> Ex. 3 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin.

Fulfillment, Entertainment America, or “EmTech.”<sup>99</sup>

Without the knowledge of Defendant Froehlig or Defendant Howes, Defendant National Fulfillment’s Consumer Care Division updated EmTech’s product sheet with the name SPRI assuming, based on the sample product produced with SPRI’s name on it, that SPRI Products, Inc. was the corporate client who owned the exercise bands on the EmTech account.<sup>100</sup>

Without the knowledge of Defendant Froehlig or Defendant Howes, Consumer Care Division representatives referred to SPRI as the company behind the EmTech account to consumers who called in to complain about the charge on their credit card.<sup>101</sup>

After being told the name SPRI Products, Inc. by Defendant National Fulfillment’s Consumer Care Division, consumers called SPRI directly to complain about the charges to their credit cards or debit cards.<sup>102</sup> SPRI, in turn, contacted Defendant National Fulfillment as a result of the complaints it received.<sup>103</sup>

**After** being notified of the call directly from SPRI, Defendant Froehlig notified management that they had been mistaken and that the exercise band produced was not the actual product but merely a sample of what EmTech’s exercise band resembled.<sup>104</sup> Defendant Howes was

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<sup>99</sup> See Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 51.

<sup>100</sup> See Ex. 3 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 50; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin at 50 and 123-24; Ex. 6 to Attach. B, Tr. of RCPI Sworn Test. of Ted Howes.

<sup>101</sup> See Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin at 123-24; Attach. A, Tr. of RCPI Sworn test. of Vicki Martin, at 52.

<sup>102</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 51 (“Q: A customer called to Spri, and then Spri called National Fulfillment?” A: “Yes.”).

<sup>103</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 51.

<sup>104</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 123-24 (Q: And it was your initial impression that the product that Rollie Froehlig gave you was the actual EmTech product?” “A: That was my impression.” “Q: Okay. And then only after the company was contacted by Spri did Rollie say that you had been mistaken and said that the sample product produced was not the actual product, but a sample of what?” “A: Of the product type, yes.”); Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 31. Attach. A, Tr. of RCPI Sworn test. of Vicki Martin, at 52 (“Q: And then was Rollie Froehlig made aware that Spri had called them?” “A: Yes.” “Q: Okay. Then after that, he came and said that this was a sample product?” “A: Yes. He said I was mistaken - - talking about me, not himself - - that I was mistaken in that I took it as an actual sample when really it was a similar product.” “Q: But this was after the Spri representative had called?” “A: Right.”).

notified that this situation occurred.<sup>105</sup>

***Despite Being Notified of High Numbers of Consumers Alleging Fraud,  
Defendants Continue Billing***

Some consumers called Defendant National Fulfillment based on the descriptor line found in the online or hard copy versions of credit card, debit card, or other bank statements.<sup>106</sup> The descriptor line for the EmTech charge that showed up on credit card and debit card statements next to the itemized \$19.90 charge, stated “EmTech” and provided one of Defendant National Fulfillment’s or Defendant Entertainment America’s toll-free numbers.

Consumers complained to Defendant National Fulfillment’s Consumer Care Division about being billed for a product that they never ordered.<sup>107</sup>

The concentration of consumers calling into Defendant National Fulfillment’s Consumer Care Division with the complaint that they were billed for a product that they never ordered comprised the vast majority of all callers who called into Defendant National Fulfillment during the time period at issue.<sup>108</sup> Interestingly, in spite of this high concentration of people who claimed to have never ordered the product, the Defendants appeared to have made their decision to continue billing again based on the numbers of chargebacks and complaints on the account.<sup>109</sup>

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<sup>105</sup> Ex. 3 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin.

<sup>106</sup> See Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 51-52.

<sup>107</sup> Ex. 7 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin. *see also* Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 72: “Q: You state in that paragraph, ‘Like all Em Tech customers, she clearly states she did not order the product, nor did she receive it, nor did she receive a letter warning of the charge. And then - -’” “A: Let me explain that I’m talking in slang here when I say “all.” ***I’m talking about all of the - - all of the calls that are complaining.***”) (emphasis added); *see also* Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 25 (“[A]nd customer service started getting lots and lots of calls from customers saying they didn’t know what the product was, that they never heard of it.”); *see also* Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 38 (“Q: And there were reports from consumers of other National Fulfillment merchants that they had been charged for a product that they never received or ordered; is that correct?” “A: I’ll have to exercise my Fifth Amendment rights.”).

<sup>108</sup> Ex. 7 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin; *see also* Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 72; *See also*, Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 117.

<sup>109</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 113 (“A: You know, when things get a little hectic at one time, it seems like that’s the only problem you have, and it’s pretty serious. But after we then looked into it and looked at the actual numbers, I guess at that date and a later date, it turned out that this wasn’t one that was extremely trying. You know, it wasn’t extremely out of the ordinary as far as the

From **August 4, 2005 until September 9, 2005**, Defendant National Fulfillment's Consumer Care Division classified approximately **one thousand and forty-three (1,043)** incoming calls under the category **"Fraud accusation/threatened BBB & AG."**<sup>110</sup>

Within the Call Comment Reports, the Consumer Care Division used a specific code, Code 69, entitled, "Fraud accusation, threatened BBB, AG," for callers who either "threatened [National Fulfillment] with an agency, or [stated that they were] going to call [their] police department," or was delivered in a tone that showed that the consumer was irate beyond helping.<sup>111</sup>

Other callers who stated that they did not order the product, but did not make agency threats or similar elevated threats would most probably not be classified under Code 69.<sup>112</sup>

Defendant National Fulfillment was notified that at least one caller called in and stated that **they were elderly and disabled, that they did not order an exercise band and that they would have no use for one.**<sup>113</sup>

Defendant National Fulfillment's Consumer Care Division, with Defendant Howes and Defendant Froehlig's approval,<sup>114</sup> developed a series of scripted responses if customer service representatives were questioned about the billing that occurred on the "EmTech" account, the order and/or ship dates, how and with whom the order was placed, and about whether there were

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numbers were concerned." "Q: And you mean numbers like chargebacks or consumer complaints?" "A: Yes.").

<sup>110</sup> See Ex. 10 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin.

<sup>111</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 95.

<sup>112</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 94-95.

<sup>113</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 84-85 ("Q: Okay. Let's see. Were you ever made aware of consumers who would call in to the consumer care line who are elderly or were disabled and would have no use for an exercise band?" "A: Yes." "Q: How many names would you say?" "A: I don't know the number. I remember one in particular. I don't recall a name, but I remember that story coming to me from the calls on the floor.").

<sup>114</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin at 89; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 105 (Defendant Froehlig maintains that he did not approve the "EmTech" script, but saw the scripts for the "EmTech" account prior to the scripts being used.).

advertisements for the exercise band.<sup>115</sup>

The script responses stated the following:

If questioned about the billing that occurred: [Response:] . . . **If you don't remember receiving this product, we'll be glad to credit your account, in full, immediately. . . .**

If questioned about the order and/or ship dates: [Response] . . . But, if you do not remember having received this product, we'll be happy to credit your account, in full, immediately. . . .

How and with whom was the order placed? How was this product advertised? [Response] . . . But, if you do not remember having received this product, we'll be glad to issue you a full credit to your account immediately. . . .<sup>116</sup>

A manual review of "EmTech's" billing records also produced several duplicate credit card numbers, slightly changed names with the same zip code or address, and other discrepancies that "EmTech's" computer program, which was designed to identify duplicate billings within the system, would not and did not identify.<sup>117</sup>

***Member of National Fulfillment's Board of Directors Openly Questions  
If "EmTech" Account Is Fraudulent, Yet Billing Continues***

On August 12, 2005, roughly halfway through the time period that credit cards were billed under the "EmTech" account, Vicki Martin, Vice President, Member of the Board of Directors, and Officer in charge of National Fulfillment's Consumer Care Division, wrote the following email to Defendant Howes and Becky Cardiff, the Vice President of Entertainment America:

We just received a call from an EmTech customer who works for some sort of court office in Florida who was charged and believes she is a victim of identity theft. **Like all of the Em Tech customers, she clearly states that she did not order the product, nor did she receive it, nor did she receive a letter warning of the charge.** This became a supervisor call and Tammie, again, mentioned the letter sent to all of the customers prior to the charge. She asked Tammie to read

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<sup>115</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 88

<sup>116</sup> Ex. 9 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 86.

<sup>117</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 102-04.

it to her. She wanted to know who signed the letter and Tammie told her Richard Whitehead. She wants a call back from Richard Whitehead and tells us that she will not let this die because someone is abusing her credit card information. She wants to talk to him only. . .

I know that consumer care is supposed to handle all of the calls for this client. But we're not qualified or prepared as we have no corporate referral number, proof of shipment, etc. Even though we credit immediately, like this consumer was, that's not enough for these callers. They want to talk directly to the person/company who had their information and claims a product was ordered and shipped. . . **This is not the only call like this. In fact, 95 percent are like this.** I would love to just say, We can handle it, but since crediting isn't enough for these consumers, we don't know what to do with these escalated calls who demand to know who holds their information that was downloaded to us. The easy answer is to let the consumer care handle these, but this client's calls are very different from even our worst cases of the past (Branseed/Buckhead, for example), and we need a unique plan of action. **My most seasoned reps and management staff are suffering from a unique feeling of helplessness (as do I) and feel that they are somehow involved in something that just feels wrong.** Please help us. You know I've never questioned our qualifications to handle consumer calls. **But it's clear to me that we're not qualified and do not have the tools and information (including myself) to handle this situation.** If we've helped them as much as we can (which crediting is our only recourse), do we just hang up on them if they refuse to be satisfied with that? I can't believe that this is our only alternative. That will only prompt these angry customers to seek help with the BBB, attorney general, or their banks.<sup>118</sup>

In her sworn testimony, Vicki Martin acknowledged that she meant that **she was wondering if there was fraud behind the "EmTech" account** when she stated, "My most seasoned reps and management staff are suffering from a unique feeling of helplessness (as do I) and feel that **they are somehow involved in something that just feels wrong.**"<sup>119</sup> Defendant

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<sup>118</sup> Ex. 7 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin.

<sup>119</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 77-78. (emphasis Added). ("[S]omething was wrong with this client. I'm talking a gut feeling from the supervisors, the CSRs, and myself." "Q: You mean fraud?" "A: I don't have proof of fraud." "Q: But that's your gut feeling?" "A: I've wondered it. I don't have proof of anything, but I've wondered it." "Q: But that's what you meant when you said, That this just feels wrong?" "A: Yes."); *see also* Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 36 ("Q: Do you believe that the EM Tech product was ever shipped out?" "A: I can't answer that based on my Fifth Amendment guarantees or something like that."); *see also* Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 38-39 ("Q: Did Rollie Froehlig, Ted Howes, and National Fulfillment and Entertainment America take the credit card information from another merchant account and bill those customers on their credit cards for products that were never delivered?" "A: I'll have to exercise my Fifth Amendment rights.").

Howes was notified of Vicki Martin's concerns.<sup>120</sup>

Vicki Martin provided daily call comment reports, the internal report used to classify the nature of consumer complaints, for the "EmTech" account to Defendant Froehlig.<sup>121</sup>

Defendant Froehlig asked Vicki Martin to report frequently on the call volume for "EmTech."<sup>122</sup> Vicki Martin had never before followed the daily call reports from beginning to end with any other client.<sup>123</sup>

On August 15, 2005, **43.51%** of the **131** callers referencing the "EmTech" account were calls that were classified under Code 69 "Fraud Accusation, threatened BBB, AG."<sup>124</sup>

**On August 16, 2005**, Vicki Martin, Defendants Froehlig and Howes's fellow board member, recommended to Defendants Froehlig and Howes that processing on the "EmTech" account should stop.<sup>125</sup>

**On August 17, 2005**, Becky Cardiff, Vice President of Defendant Entertainment America, also recommended to Defendants Froehlig and Howes that processing on the "EmTech" account should stop.<sup>126</sup> Becky Cardiff stated in this e-mail, "We just don't have the required information to show the validity of the product should the processor demand to see it."<sup>127</sup>

On August 23, 2005, **44.85%** of the **136** callers who called in referencing the Em Tech account were classified under Code 69 "Fraud accusation, threatened BBB, AG."

On August 29, 2005, **57.35%** of the **136** callers who called in referencing the Em Tech

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<sup>120</sup> Ex. 9 to Attach. B, Tr. of RCPI Sworn Test. of Ted Howes.

<sup>121</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 91.

<sup>122</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 91.

<sup>123</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 91.

<sup>124</sup> Ex. 10 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin.

<sup>125</sup> Ex. 6 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 90-91.

<sup>126</sup> Ex. 6 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 92.

<sup>127</sup> Ex. 6 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

account were classified under Code 69 “Fraud accusation, threatened BBB, AG.”

On August 31, 2005, **67.09%** of the **79** callers who called in referencing the “EmTech” account were classified under Code 69 “Fraud accusation, threatened BBB, AG.”

From August 31, 2005 to the beginning of October, 2005, the percentage of “EmTech” callers whose complaints were so escalated to warrant being placed under Code 69 “Fraud accusation, threatened BBB, AG” comprised roughly **50-60 %** of the calls.<sup>128</sup>

Despite these high percentages and call volumes, the consumers on the “EmTech” account continued to be billed at least until **September 6, 2005**.<sup>129</sup>

At least some individuals who were billed on the “EmTech” account and stated that they had never ordered exercise bands were customers of other current or former National Fulfillment clients, including, but not limited to Aloette Cosmetics, Youth Factor, Barbara K, and Banjo Minnow.<sup>130</sup> In spite of this, National Fulfillment did not call its own clients to inform them of the complaints.<sup>131</sup>

Defendant Froehlig was notified that these consumers were calling into the Consumer Care Division, stating that they did not order a product from “EmTech”, that they were alleging that their credit card information had been misused, and that they were former customers of Youth Factor, Aloette, Banjo Minnow and Barbara K by **September 7, 2005**.<sup>132</sup>

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<sup>128</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 98-99.

<sup>129</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 100.

<sup>130</sup> Ex. 8 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 81; Attach. G, Tr. of RCPI Sworn Test of Townley Chattman, at 33-34; *see also* Attach. F, Tr. of RCPI Sworn Test. of Jerry Bellante, at 31-32 (“Q: Were customers of EM Tech also the customers of other National Fulfillment merchants including Aloette Cosmetics, Youth Factor, Botopical, Banjo Minnow, Barbara Kay [sic], and World for Less?” “A: On all of those questions, I’ll have to exercise my Fifth Amendment rights.”).

<sup>131</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 122 (“Q: Did you make any calls to the client for Youth Factor or Barbara K or - -” “A: No. The answer is no, I did not.” “Q: Did anyone that you know of?” “A: I do not know whether anybody did or not. If anybody did, it would have been Vicki Martin or one of her people.”); Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 80.

<sup>132</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 110.



Complaints continued to come in under the Em Tech account. On **September 13, 2005**, **66.39%** of the **122** callers who called in referencing the Em Tech account were classified under Code 69 “Fraud accusation, threatened BBB, AG.”<sup>133</sup>

As of **September 14, 2005**, Defendant Froehlig was notified by his fellow board member that there were “more and more” Youth Factor customers that were accusing Defendant National Fulfillment of fraudulent behavior.<sup>134</sup>

Defendant Froehlig, Defendant Howes, and the corporate Defendants were aware of this yet no one at either Defendant National Fulfillment or Defendant Entertainment America, including Defendant Froehlig and Defendant Howes, contacted their clients to notify them of the substance of these complaints.<sup>135</sup>

At some point around this time, after approximately thirty thousand (30,000) consumers had their credit card accounts billed under the “EmTech” by the Defendants, Defendant Froehlig came back to Townley Chattman with another disc for more billing.<sup>136</sup>

***In Spite of This Knowledge, Defendants Wanted to Bill More and Tried to Keep Billing***

Despite these problems, on **September 16, 2005**, Defendant Froehlig and Howes ordered that the next disc on the EmTech account should not process **before September 29, 2005**.<sup>137</sup>

Management, during another meeting, told Defendant Froehlig again that they felt very uncomfortable doing any more billing, that something did not seem right.<sup>138</sup>

***National Fulfillment and Entertainment America***

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<sup>133</sup> Exhibit 10 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin.

<sup>134</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 123.

<sup>135</sup> Ex. 8 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 81.

<sup>136</sup> Attach. G, Tr. of RCPI Sworn test. of Townley Chattman, at 38.

<sup>137</sup> Ex. 1 to Attach. B, Tr. of RCPI Sworn Test. of Ted Howes (“Based on conversations with Ted and Rollie this morning, the next disc of EMTECH charges should not process before September 29th, 2005.”) (emphasis added); Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 54.

<sup>138</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 38.

### *Kept the Money from the “EmTech” Account*

After the credit card numbers were processed by First Data Merchant Services, the money collected from the billing has not been transferred outside of Defendant Entertainment America or Defendant National Fulfillment’s bank accounts.

Defendant National Fulfillment deducted its fees for the customer service and order processing on the “EmTech” account from the money that was returned from First Data Merchant Services after the credit card numbers were charged.<sup>139</sup>

“EmTech” never sent in any checks to pay for these fees.<sup>140</sup> Instead, funds were deducted from the “EmTech” account at Defendant Entertainment America to pay for accounts that Marc Nagoshiner had with Defendant National Fulfillment where Defendant National Fulfillment was still owed money on a previous product.<sup>141</sup> The money collected has never been disbursed to “EmTech.”<sup>142</sup> A representative from “EmTech” has never requested the money collected under the “EmTech” account.<sup>143</sup>

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<sup>139</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes at 69.

<sup>140</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 68 (“Q: [S]o on the accounts that EMTECH, for the EMTECH accounts for both National Fulfillment and Entertainment America, who sent in the checks to pay the bills from EMTECH?” “A: They were paid by Entertainment America from proceeds.”); Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 31.

<sup>141</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 143.

<sup>142</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 69 (“Q: Okay. So when was the money on the EMTECH account transmitted to EMTECH?” “A: It wasn’t.”); Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 40 (“Q: Where were the monies collected from the credit card billing? I guess they went through a third party, and then it came back?” “A: Yeah. That’s what happens in our world.” “Q: Where is it currently?” “A: It’s at Entertainment America.” “Q: So it hasn’t been disbursed to EM Tech?” “A: No. I believe Ted has testified that he’s tried to get hold of them and waiting for either the estate or somebody to contact them.”).

<sup>143</sup> See Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 40-41.

## **ARGUMENT**

### **I. THE DEFENDANTS HAVE ENGAGED IN IDENTITY THEFT**

The Tennessee Identity Theft Deterrence Act of 1999<sup>144</sup> (“ITDA”) prohibits directly or indirectly engaging in identity theft or engaging in any unfair, deceptive, misleading act or practice for the purpose of directly or indirectly engaging in identity theft.<sup>145</sup>

Under Tenn. Code Ann. § 47-18-2102(6), “identity theft” is defined as:

(A) Obtaining, possessing, transferring, using or attempting to obtain possess, transfer or use, for unlawful economic benefit, one or more identification documents or personal identification numbers of another person, or (B) otherwise obtaining, possessing, transferring, using or attempting to obtain, possess, transfer or use, for unlawful economic benefit, one (1) or more financial documents of another person.

Under Tenn. Code Ann. § 47-18-2102(5), “identification documents” are defined as:

[A]ny card, certificate or document which identifies or purports to identify the bearer of such document, whether or not intended for use as identification. . . . (emphasis added).

Under Tenn. Code Ann. § 47-18-2102(4), “financial document” means any:

[C]redit card, debit card, check or checking account information or number . . . (Emphasis added).

“Unlawful economic benefit” is not defined in the ITDA. The billing of consumer credit cards without the consumers’ permission is unquestionably an illegal, as well as an unlawful, economic benefit. At least three separate State criminal violations are potentially established by the Defendants’ conduct.<sup>146</sup> In the civil arena, the broad phrasing of “unlawful economic benefit”

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<sup>144</sup> Tenn. Code Ann. § 47-18-2101 *et seq.*

<sup>145</sup> Tenn. Code Ann. § 47-18-2103 (1), (2).

<sup>146</sup> *See, e.g.* Tenn. Code Ann. § 39-14-103 (“Theft of Property” - A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property with the owner’s effective consent); *see also* Tenn. Code Ann. § 39-14-118 - Illegal Possession or fraudulent use of credit or debit card; and Tenn. Code Ann. § 38-14-150, Criminal Identity Theft.

certainly includes the tort of conversion. In *General Elec. Credit Corp. of Tennessee v. Kelly & Dearing Aviation*, the Tennessee Court of Appeals adopted the following definition of conversion:

To constitute conversion, the defendant must intend to convert the property. **This intention does not necessarily have to be a matter of conscious wrongdoing**, but can merely be an exercise of dominion or control over the property in such a way that would be inconsistent with the owner's rights and which results in injury to him.<sup>147</sup>

Billing a credit card without the permission of the holder is using this information in such a way that would be inconsistent with the property owner's rights. This action also results in injury to the holder of the card if the charge is not noticed and then accidentally paid or to the bank if the consumer asserts his chargebacks rights in a timely manner.

The facts indicate that the Defendants billed consumers without their permission for a product that never existed under a phony account known as "EmTech." Originally, Defendant Froehlig approached Townley Chattman, the Director of Client Services at Defendant National Fulfillment, with what appeared to be a disc that would be provided to a client after they ceased being an active client.<sup>148</sup> Defendant Froehlig referred to the person as Eddie Mischan and provided Ms. Chattman with a disc containing approximately three hundred thousand (300,000) consumers, including credit card information.<sup>149</sup> Ms. Chattman questioned why all of Emson Products consumers' would order the "EmTech" exercise bands.<sup>150</sup> After being questioned, Defendant Froehlig took the disc back only to later return with a disc of thirty thousand (30,000) consumer names and information.<sup>151</sup> Emson Products was not mentioned again on the account.<sup>152</sup>

In Defendant Froehlig's and Defendant Howes's sworn testimonies, however, they refer to

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<sup>147</sup> *General Elec. Credit Corp. of Tennessee v. Kelly & Dearing Aviation*, 765 S.W.2d 750, 753 (Tenn. 1988). (emphasis added).

<sup>148</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22-23.

<sup>149</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22-23.

<sup>150</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22-23.

<sup>151</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 22-23.

<sup>152</sup> Attach. G, Tr. of RCPI Sworn Test of Townley Chattman, at 22-23.

Marc Nagoshiner as the individual responsible for the “EmTech” account.<sup>153</sup> Mr. Nagoshiner died on December 30, 2005 prior to Defendant National Fulfillment’s response to the State’s Request for Consumer Protection Information, in which the company lists Marc Nagoshiner’s name and address.<sup>154</sup> Neither Townley Chattman, Director of Client Services,<sup>155</sup> nor Vicki Martin, Vice President and fellow board member, associate the name Marc Nagoshiner as being connected with the “EmTech” account.<sup>156</sup>

The facts show that the account was suspect from the very beginning. Management first rejected the client because they did not have enough information to verify the account.<sup>157</sup> Despite this, the Defendants decided to open an account and begin billing.<sup>158</sup> From the beginning, the Defendants instituted an “immediate credit - no questions asked” refund policy that including the payment of overdraft charges.<sup>159</sup> This policy had never been instituted before by the Defendants or been instituted since.<sup>160</sup>

At no point did the Defendants have a sample of the actual product,<sup>161</sup> a sample advertisement,<sup>162</sup> a referral number (other than the purported phone number for Marc Nagoshiner),<sup>163</sup> specific dates that consumers were purportedly sent “EmTech’s” product, or specific dates that

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<sup>153</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 30; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 28.

<sup>154</sup> Attach. E, State of Fla., Office of Vital Statistics, Florida Certificate of Death for Marc Nagoshiner.

<sup>155</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 14.

<sup>156</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 22-23.

<sup>157</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 78.

<sup>158</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 68.

<sup>159</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 37.

<sup>160</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 37.

<sup>161</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 147; Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 47-48; see also Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 50.

<sup>162</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 57; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 60.

<sup>163</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 35.

consumers purportedly ordered “EmTech’s” product.<sup>164</sup>

The facts also show that the information that was produced to management about the account was suspect. Following management’s request for a copy of the letter purportedly sent to consumers by “EmTech” prior to being billed, Defendant Froehlig produces a letter under the name Richard Whitehead.<sup>165</sup> The “Richard Whitehead” letter lists one of the Consumer Care Division’s toll-free numbers at Defendant National Fulfillment yet the Consumer Care Division received no calls from individuals referencing the letter from Richard Whitehead.<sup>166</sup> Despite Vicki Martin’s suggestion, the Defendants never attempted to send out the letter themselves.<sup>167</sup>

Moreover, Defendant Froehlig states that “Dick Whitehead,” a business acquaintance of his, had nothing to do with the “EmTech” account.<sup>168</sup> This statement comes despite the fact that Defendant Froehlig was the only individual at either National Fulfillment or Entertainment America who (purportedly) had contact with “EmTech”<sup>169</sup> and the fact that Dick Whitehead’s name and residential and business address are listed on the most recent Client Set Up Sheet for “EmTech.”<sup>170</sup>

After management requested a sample product, Defendant Froehlig produced a sample product. Vicki Martin and other employees were under the impression that the sample of the product produced by Defendant Froehlig was “EmTech’s” actual exercise band.<sup>171</sup> Only after Defendant National Fulfillment was contacted by the owner of the sample product that was produced did Defendant Froehlig approach Vicki Martin and tell her that she had been mistaken and

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<sup>164</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 26; Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 72-73.

<sup>165</sup> Attach. G, Tr. of RCPI Sworn Test. of Townley Chattman, at 24-25.

<sup>166</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 45.

<sup>167</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 63.

<sup>168</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 66.

<sup>169</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 48-49.

<sup>170</sup> Ex. 3 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

<sup>171</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 123.

that the sample produced “was like” “EmTech’s” exercise band but not a sample version of EmTech’s actual exercise band.<sup>172</sup>

Billing continued even after Vicki Martin wondered aloud to Defendant Howes whether the “EmTech” account was fraudulent.<sup>173</sup> Billing continued even after Defendants received over one thousand (1,000) calls from consumers whose complaints were so elevated that they were classified as, Code 69, “Fraud accusation, Threatened BBB, AG.”<sup>174</sup> Billing continued despite Defendants being notified that the Consumer Care Division had not received any call referencing the Richard Whitehead letter.<sup>175</sup> Billing continued even after Defendants were notified that some of the customers who stated that they never ordered “EmTech’s” product were found in other client databases such as Aloette, Banjo Minnow, and Youth Factor.<sup>176</sup> Despite this, the Defendants made no attempt to contact their own clients to inform them of the problem.<sup>177</sup> Billing continued despite the requests for billing to stop from Becky Cardiff, the Vice President of Entertainment America, and Vicki Martin, the Vice President overseeing Consumer Care Division and fellow Board Member.<sup>178</sup>

The disbursement of the proceeds from the “EmTech” billing is telling and vividly demonstrates an unlawful economic benefit. After sending the numbers to third-party First Data Corp. to actually be run under “EmTech’s” merchant account, the money was retained by Defendant Entertainment America.<sup>179</sup> Then, Defendant National Fulfillment took approximately **\$ 510,000** from Defendant Entertainment America’s account to pay for fees for its customer service and order

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<sup>172</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 123-124.

<sup>173</sup> Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 77-78.

<sup>174</sup> Ex. 10, Tr. of RCPI Sworn Test. of Vicki Martin.

<sup>175</sup> Ex. 6 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig.

<sup>176</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 123.

<sup>177</sup> Ex. 8 to Attach. A, Tr. of RCPI Sworn Test. of Vicki Martin, at 81.

<sup>178</sup> Ex. 6 to Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig, at 92.

<sup>179</sup> Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 143.

processing duties and to pay off old debts on other accounts set up by Marc Nagoshiner.<sup>180</sup> The money, despite this dissipation, has never left Defendant National Fulfillment or Defendant Entertainment America.<sup>181</sup> No one from “EmTech” has attempted to collect on the remainder.<sup>182</sup>

## **II. THE TEMPORARY INJUNCTION AND ASSET FREEZE REQUESTED BY THE STATE IS APPROPRIATE UNDER TENN. CODE ANN. § 47-18-2105**

### **A. This Court Has the Authority to Grant the Requested Relief**

The Attorney General of Tennessee has broad statutory and common law authority with respect to protecting the public.<sup>183</sup> The Tennessee Supreme Court has held that “[a]s the chief law enforcement officer of the state, the attorney general may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection.”<sup>184</sup>

Section 2105 of the ITDA authorizes the Attorney General to bring an action, including a temporary injunction and an asset freeze, in the name of the State whenever there is reason to believe a person has engaged in any practice declared unlawful by this part and the action is in the public interest.

In cases such as this one, where a law enforcement authority acts as a “statutory guardian charged with safeguarding the public interest,” the standard for a temporary injunction is lower than the standard applied to private litigants.<sup>185</sup> The authorization to the Attorney General to seek

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<sup>180</sup> Attach. D, “EmTech Client Reconciliation Sheet as of 1/112007,” at 1; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes at 143.

<sup>181</sup> Attach. D, “EmTech Client Reconciliation Sheet,” at 1; Attach. B, Tr. of RCPI Sworn Test. of Ted Howes, at 143.

<sup>182</sup> Attach. C, Tr. of RCPI Sworn Test. of Rollie Froehlig at 40-41.

<sup>183</sup> Tenn. Code Ann. § 8-6-109(b)(1). *State ex rel. Inman v. Brock*, 622 S.W.2d 36, 41 (Tenn. 1981); *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1991).

<sup>184</sup> *State v. Heath*, 806 S.W.2d at 537.

<sup>185</sup> *State v. Olomoshua*, No. 06C2912, at 2, Cir. Ct. of Tenn., 20th Jud. Dist, Davidson County, Part III (Nov. 14, 2006); *Tennessee Real Estate Comm’n v. Hamilton*, No. 96-3330-III, at 6, Ch. Ct. of Tenn., 20th Jud. Dist., Davidson County, Part III (Dec. 1996), *aff’d*, No. 01A01-9707-CH-00320, 1998 WL 272788 at \*4-6 (Tenn. Ct. App. May 22, 1998); *FTC v. Nat’l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634 (M.D. Tenn. Aug. 18, 2005); *Microsoft Corp. v. Action Software*, 136 F.Supp. 2d 735, 738-



injunctive and other equitable relief constitutes the legislative determination that an irreparable injury has already occurred in any violation of the Act.<sup>186</sup> “Unlike private actions, which are rooted in the equity jurisdiction of the courts, in suits based upon statutory authority, proof of irreparable harm or the inadequacy of other remedies is not required.”<sup>187</sup> The U.S. District Court for the Middle District of Tennessee has also held, “[w]here a government entity demonstrates a substantial showing of a violation of a statute, such violation is sufficient to establish immediate and irreparable harm.”<sup>188</sup> Irreparable injury, therefore, need not be shown<sup>189</sup> and harm to the public is presumed.<sup>190</sup> “The standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief.”<sup>191</sup>

In the ordinary case, traditional equitable injunctions require that the trial judge’s discretion balance four factors which are not prerequisites to be met.<sup>192</sup>

The most common description of the standard for a preliminary injunction in federal and state courts is a four-factor test: (1) the threat of irreparable harm to plaintiff if

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39 (N.D. Ohio 2001); see also *The Virginia Beach SPCA, Inc. v. South Hampton Roads Veterinary Ass’n.*, 329 S.E.2d 10, 13 (Va. 1985); *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2nd Cir. 1975); *FTC v. World Wide Factors*, 882 F.2d 344, 346 (9th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

<sup>186</sup> 11 Wright & Miller, *Federal Practice and Procedure*, 461-62 (1973).

<sup>187</sup> *Nat’l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634, at \*3 (M.D. Tenn. Aug. 18, 2005)(internal citations omitted); see also *State v. Olomoshua, et al*, No. 06C2912, at 2, Cir. Ct. of Tenn., 20th Jud. Dist. Davidson County, Part III (Nov. 14, 2006); *State v. Continental Distributing Co., Inc.*, Ch. Ct. of Tenn., 11th Jud. Dist., Hamilton County (Oct. 7, 1994).

<sup>188</sup> *Tennessee Real Estate Comm’n v. Hamilton*, No. 96-3330-III, p. 6, Ch. Ct. of Tenn., 20th Jud. Dist., Davidson County, Part III (Dec. 1996), *aff’d*, No. 01A01-9707-CH-00320, 1998 WL 272788 at \*4-6 (Tenn. Ct. App. May 22, 1998).

<sup>189</sup> *State v. Continental Distributing Co., Inc.*, Ch. Ct. of Tenn., 11th Jud. Dist., Hamilton County (Oct. 7, 1994); *SKS Merch., LLC v. Barry*, 233 F.Supp.2d 841, 845 (E.D. Ky. 2002); *FTC v. Int’l Computer Concepts, Inc.*, No. 594CV1678, 1994 WL 730144 at \*12 (N.D. Ohio Oct. 24, 1994); *World Travel Vacation Brokers*, 861 F.2d at 1029. see also *People, ex rel. Hartigan v. Stianos*, 475 N.E.2d 1024, 1027-28 (Ill. App. 1985); *State v. Fonk’s Mobile Home Park & Sales*, 343 N.W.2d 820, 821 (Wis. App. 1983); *State ex rel Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 370-71 (Mo. App. 1973); *United States v. Sene X Eleemosynary Corp.*, 479 F.Supp. 970, 980-81 (S.D. Fla. 1979).

<sup>190</sup> *FTC v. Nat’l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634, at \*3 (M.D. Tenn. Aug. 18, 2005)(internal citations omitted); see also, *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); *World Travel Vacation Brokers*, 861 F.2d at 1029.

<sup>191</sup> *Bowles*, 321 U.S. at 331.

<sup>192</sup> *Frisch’s Restaurant, Inc. v. Shoney’s, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985).

the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on the defendants; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.<sup>193</sup>

Tenn. R. Civ. P. 65.04 states the standard for the issuance of a temporary injunction is if:

[I]t is clearly shown by a verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment . . . or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

A case such as this one is especially well-suited for a temporary injunction. Section 2104 of the ITDA provides that "[t]he courts are authorized to issue orders and injunctions to prevent violations of this part or issue any other necessary or appropriate relief or orders," and courts have consistently imposed temporary injunctions where, as here, there is evidence of widespread and pervasive deception and unlawful activity.<sup>194</sup>

## **B. The Evidence Presented Justifies Entry of a Temporary Injunction and Asset Freeze**

The State has submitted compelling evidence which establishes that the Defendants' have engaged in identity theft and other unfair or deceptive acts or practices associated with their billing scheme.

### **1. The State Has Demonstrated a Likelihood of Success on the Merits**

As evidenced by the Statement of Facts in Part I of this memorandum and the five sworn testimonies attached to the State's Motion for a Temporary Injunction and Asset Freeze, the State

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<sup>193</sup>*South Cent. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 (Tenn. Ct. App. 2000), *perm. app. denied* (quoting Banks & Entman, TENNESSEE CIVIL PROCEDURE § 4-3(1) (1999)); *Tesmer v. Granholm*, 333 F.3d 683, 702 (6th Cir. 2003) (reversed on other grounds); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (citing only two components: "the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.").

<sup>194</sup> See also *World Travel Vacation Brokers*, 861 F.2d at 1026-28; *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989); *FTC v. Amy Travel Service*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir. 1982).

has demonstrated a likelihood of success on the merits with regard to its claims arising under the Identity Theft Deterrence Act.

For purposes of the temporary injunction hearing, Tennessee state courts,<sup>195</sup> federal courts,<sup>196</sup> and the Tennessee Rules of Civil Procedure<sup>197</sup> all allow for the admittance of affidavits over hearsay objections. Tenn. R. Civ. P. 65.04 expressly allows for the use of a “verified complaint, affidavit, or other evidence.” The attached sworn testimonies and accompanying exhibits are identical to the verified complaint and the affidavit in that the witness swears or affirms that the facts he or she has stated are the truth or are truthful to the best of his or her knowledge. The Attorney General is authorized to release the transcripts of sworn testimonies under Tenn. Code Ann. § 47-18-106(g).

## **2. The Balance of Equities Mandates a Temporary Injunction and Asset Freeze**

The balance of equities mandates temporary injunctive relief. Where, as here, public and private equities are at issue, public equities far outweigh private equities.<sup>198</sup>

Defendants’ past misconduct “gives rise to the inference that there is a reasonable likelihood of future violations.”<sup>199</sup> Further, Defendants can have no vested interest in a business activity that is unlawful.<sup>200</sup> Here, without the entry of the proposed temporary injunction and asset freeze, money collected under the “EmTech” account will likely further dissipate.

Past misconduct is “highly suggestive of the likelihood of future violations,” especially

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<sup>195</sup> *Denver Area Meat Cutters and Employers Pension Plan v. Clayton*, 120 S.W.3d 841, 857 (Tenn. Ct. App. 2003).

<sup>196</sup> *See, e.g., Nat’l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634, at \*2.

<sup>197</sup> Tenn. R. Civ. P. 65.04 (2) (“A temporary injunction may be granted during the pendency of an action if it is clearly shown by *verified complaint, affidavit* or other evidence that the movant’s rights are being or will be violated by an adverse party. . . .”)

<sup>198</sup> *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989).

<sup>199</sup> *SEC v. R. J. Allen & Assoc., Inc.*, 386 F.Supp. 866, 877 (S.D. Fla. 1974); *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (“Once a violation is demonstrated, the moving party need only show that there is some reasonable likelihood of future violations.”) (citations omitted).

<sup>200</sup> *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972).

where, as here, there is a pattern of unlawful conduct as opposed to an isolated occurrence.<sup>201</sup>

### III. AN ASSET FREEZE IS EXPRESSLY AUTHORIZED UNDER THE ITDA

The Identity Theft Deterrence Act of 1999 gives the Attorney General the authority to seek and for courts to grant asset freezes in cases brought under the Act. Under Tennessee case law the standards for imposing a statutory asset freeze in particular have not been well established.

An asset freeze is essentially a specific type of temporary injunction (or restraining order) involving the Defendants' assets. In the federal system, the Middle District of Tennessee has applied the less burdensome standard for statutory injunctions to temporary asset freezes.

Upon consideration of a preliminary injunction that included an asset freeze, the Court in *FTC v. National Testing Services, LLC* stated that proof of irreparable harm or the inadequacy of other remedies is not required.<sup>202</sup> The Court also stated that it should weigh the equities and consider the government's likelihood of success on the merits.<sup>203</sup> In weighing the equities when the government is a party, the State balances the hardships of the public interest against a private interest, the public interest should receive greater weight.<sup>204</sup>

At the federal level, in a *private suit* seeking a *non-statutory* asset freeze, the Middle District of Tennessee has applied the traditional Rule 65 standard for private, non-statutory injunctions.<sup>205</sup> These factors include: (1) whether the Plaintiff has demonstrated a likelihood of success on the merits, (2) whether there is irreparable harm, (3) whether there would be substantial harm to others, and (4) whether the asset freeze is in the public interest.

While the State submits that its burden is less under a statutory injunction as mentioned

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<sup>201</sup> *Commodity Futures Trading Comm. v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979).

<sup>202</sup> *Nat'l Testing Servs., LLC*, No: 3:05-0613, 2005 WL 2000634, at \*3.

<sup>203</sup> *Nat'l Testing Servs., LLC*, No: 3:05-0613, 2005 WL 2000634, at \*3.

<sup>204</sup> *Nat'l Testing Servs., LLC*, No: 3:05-0613, 2005 WL 2000634, at \*3.

<sup>205</sup> *Advocate Capital, Inc. v. Law Office of A. Clark Cone, P.A.*, No. 3:06-0847, 2006 WL 3469576 (M.D. Tenn. Nov. 29, 2006).

above, the State submits that an asset freeze is warranted even under the more burdensome standard applied by the Middle District in *Advocate Capital*.

**A. The State has shown a substantial likelihood of success on the merits.**

The Sixth Circuit Court of Appeals has held that “[i]n order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success.”<sup>206</sup> “However, it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair grounds for litigation and thus for more deliberate investigation.”<sup>207</sup>

By proffering the above statement of facts and attached sworn testimonies and exhibits, the State has certainly raised questions in its above statement of facts and in the attached sworn testimonies and exhibits to go to the merits that are so serious and substantial as to make them fair grounds for litigation.

**B. The Dissipation of Proceeds Collected Under Defendant Entertainment America’s Account Establishes Irreparable Harm**

While, as previously discussed, the State need not show immediate and irreparable harm under a statutory injunction, in the federal system the Middle District of Tennessee has stated that irreparable harm absent an asset freeze is “even more apparent where the very assets subject to a potential judgment will likely be dissipated without entry of the order.”<sup>208</sup> So even absent having to prove this requirement, the State has established irreparable harm because evidence exists where there is evidence that the assets from the “EmTech” account have been dissipated. Only approximately \$34,000 remains from the proceeds of the “EmTech” billings in Defendant

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<sup>206</sup>*Six Clinics Holding Corp., II v. CAFCOMP Systems*, 119 F.3d 393, 407 (6th Cir.1997).

<sup>207</sup>*Six Clinics Holding Corp., II v. CAFCOMP Systems*, 119 F.3d 393, 407 (6th Cir.1997).

<sup>208</sup>*Advocate Capital, Inc. v. Law Office of A. Clark Cone, P.A.*, No. 3:06-0847, 2006 WL 3469576, at \*3 (M.D. Tenn. Nov. 29, 2006) (citing *Elliott v. Kiesenwetter*, 98 F.3d 47, 58 (3d Cir. 1996)).

Entertainment America's account. Defendant National Fulfillment, has taken the remainder of the proceeds, approximately \$510,000, for its fees under the account and to pay for the old debts of Marc Nagoshiner.

### **C. Substantial Harm to Others**

Defendant National Fulfillment and Defendant Entertainment America are businesses that employ over a hundred individuals in the Middle Tennessee area. The State's proposed asset freeze would be limited to the amount billed under the "EmTech" account in order to pay for consumer restitution, should restitution be awarded to consumers by this Court. The State does not seek to freeze all of the monies that it could potentially collect in this lawsuit. While the State is sympathetic to the plight of Defendant National Fulfillment and Defendant Entertainment America's employees who did not participate in the scheme, the funds collected from the "EmTech" account, which the State has demonstrated a substantial likelihood that they were obtained through identity theft, should not be used as a subsidy or liquid asset for either Defendant Entertainment America or Defendant National Fulfillment. Again, when the Court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.<sup>209</sup> Should an asset freeze not be issued, it is the consumers, whose credit card and debit card numbers were unlawfully billed, who will likely not receive restitution due to the continued dissipation of the monies collected under the "EmTech" account by the Defendants.

### **D. The Asset Freeze is in the Public Interest**

This Court should issue the asset freeze because the State has a strong interest in protecting and preserving the integrity of the commercial marketplace in Tennessee. The State

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<sup>209</sup> *Nat'l Testing Servs.*, No. 3:05-0613, 2005 WL 2000634, at \* 3.

asserts that the public interest is served if the State is able to collectively preserve ill-gotten proceeds that individuals who were billed do not have the incentive, due to the high transaction costs of litigation, to pursue themselves. Many of these consumers presumably paid their credit card bill without noticing the “EmTech” charge. After the State has shown a substantial likelihood of success on the merits for its identity theft claim, the Defendants have no vested right in the benefits of unlawfully collected proceeds.

### CONCLUSION

In a twenty-first century marketplace trending towards a cashless economy, the beneficiaries of “cashless” payment methods must also act as the *de facto* guardians of the new economy. The State has demonstrated a substantial likelihood of success on the merits of its claim that the Defendants, instead of fulfilling their role as commercial guardians actively tried to undermine the integrity of the marketplace, by engaging in identity theft through their unlawful billing scheme.

This Court has the ability to temporarily enjoin the Defendants to prevent similar schemes from occurring during this action and to freeze the proceeds that the Defendants received through their unlawful billing scheme in order to preserve the amount of monies available for restitution for consumers. The temporary injunction and asset freeze are in the public interest and should issue following a full hearing. **This is the first application by the Plaintiff, the State of Tennessee, for extraordinary relief.**

Respectfully submitted,

ROBERT E. COOPER, JR.  
B.P.R. No. 010934  
Attorney General & Reporter

A handwritten signature in cursive script, reading "Brant Harrell".

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**CERTIFICATE OF SERVICE**

On this the 16<sup>th</sup> day of February, 2007, I, Brant Harrell, do hereby certify that the foregoing document was served through original process by agreement on at the following address:

David Herbert  
Ortale, Kelly, Herbert & Crawford  
200 Fourth Avenue, North  
Nashville, TN 37219

(Counsel for Defendants National Fulfillment, Inc. Entertainment America, Inc., Roland Froehlig (in his individual and representative capacity), and Ted Howes (in his individual and representative capacity)).

  
BRANT HARRELL  
Assistant Attorney General